INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Counter-Statement of the Case	2
Reasons for Denying the Petition	4
1. The Decision of the Court of Appeals Was Not a Final One, Its Grounds Were Narrow and a Consideration by This Court Would Not Settle Any Broad or Important Question of Federal Law	4
2. The Interpretation of Section 315 by the Court of Appeals Is Conducive to Freedom of Speech and in the Public's Interest	5
3. On the Point Decided the Decision of the Court of Appeals Was Correct	9
a. Congress Meant to Confine Section 315 to the Broadcasts of Candidates Themselves	9
b. The Regulations of the Federal Communications Commission Support the Interpretation of the Court of Appeals	10
c. The Distinction Between "Candidate" and Speakers On "Behalf of a Candidate" Is Recognized by the Broadcasting Industry and Many State Legislatures	12

INDEX (Continued).

Page

4. The Court of Appeals Could Have Reached Its Decision On Other Grounds 13

a. The Broadcasts Were Not Broadcasts Under Section 315 13

b. Section 315 Does Not Relieve a Broadcasting Station From Liability for Defamation 14

5. There Is No Conflict of Decision 15

CONCLUSION 15

TABLE OF CASES CITED.

	Page
Bay State Beacon, Inc. v. F. C. C., 171 F. 2d 826...	6
Bruce v. Reed, 104 Pa. 408, 49 Am. Rep. 586 (1883)..	8
McIntire v. Wm. Penn Broadcasting Co., (1945 C. C. A. 3rd) 151 F. 2d 597 (cert. den. 327 U. S. 779, 90 L. Ed. 1007, 66 S. C. 530)	6
Summit Hotel v. National Broadcasting Company, 336 Pa. 182, 8 A. 2d 302	5

STATUTES CITED.

	Page
Act of June 19, 1934, C. 652, 49 Stat. 1088 (Federal Communications Act):	
47 U. S. C. 307 (d)	5
47 U. S. C. 309 (a)	6
47 U. S. C. 315 .....2, 4, 5, 6, 7, 9, 10, 12, 13	

MISCELLANEOUS.

	Page
64 Harvard Law Review 727 .....12, 13	
34 Iowa Law Review 12 (1948)	8
Regulations of the Federal Communications Commission:	
Section 3.105 [47 C. F. R. 3.105]	6
Section 3.181 (a) (2) [47 C. F. R. 3.181 (a) (2)]..11, 12	
Section 3.189 (d) [47 C. F. R. 3.189 (d)]	13
Section 3.190 (a) [47 C. F. R. 3.190 (a)]	11
Section 3.190 (2) (d) [47 C. F. R. 3.190 (2) (d)]..	12
Restatement of the Law of Agency, Sections 1 and 3..	8
Restatement of the Law of Agency, Section 247	8

IN THE

Supreme Court of the United States.

October Term, 1950.

No. 574.

WESTINGHOUSE RADIO STATIONS, INC., TRIANGLE PUBLICATIONS, INC. AND WCAU, INC.,
Petitioners,

v.

DAVID H. H. FELIX,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R26a-29a) is reported at 89 F. Supp. 940. The opinion of the Court of Appeals for the Third Circuit (R36-45) is reported at 186 F. (2d) 1 (advance reports).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Did the Court of Appeals err in holding that Section 315 of the Federal Communications Act of 1934 (47 U. S. C. Section 315), which, by its terms, applies only to broadcasts by a "legally qualified candidate for any public office", cannot be stretched by judicial interpretation to apply, as well, to broadcasts by one who is not a candidate for any office?

STATUTE INVOLVED.

Section 315 of the Communications Act of 1934 is set forth in the Petition at pp. 2-3.

COUNTER-STATEMENT OF THE CASE.

On October 24th and 25th, 1949, one William F. Meade, Chairman of the Republican Central Campaign Committee of Philadelphia, made two speeches from petitioner Westinghouse Radio Station, Inc.'s broadcasting station from a written manuscript, submitted to petitioner in advance of the broadcast.

From these broadcasts electrical transcriptions were made which were in turn broadcast over four other stations at later hours on the same dates.

Before the first broadcasts (on October 24th) over petitioners' Triangle Publications, Inc., and WCAU, Inc., stations, respondent called said stations on the telephone and warned them not to repeat the libelous broadcast of petitioner Westinghouse.

Despite this warning the speech was broadcast over both stations and the second speech was broadcast on the following day.

Respondent brought suit for libel against all five radio stations, four of them in the United States District Court for the Eastern District of Pennsylvania.

The three petitioners filed Motions for Summary Judgment and argument was heard on the motion of petitioner Westinghouse. At that time it was agreed that the disposition of the other cases (including the one in which a motion was not filed) should follow that of Westinghouse, *but the only case heard and decided by the District Court was Westinghouse.*

The District Court found that the broadcasts were within Section 315 of the Federal Communications Act of 1934 and although it found the utterances libelous (for the purpose of the argument) it awarded judgment to the petitioner Westinghouse (defendant) on its Motion.

Thereafter two of the other defendants entered judgment by agreement.

Appeals were taken by the respondent in all three cases to the United States Court of Appeals for the Third Circuit.

This court reversed the District Court and remanded the cases for trial on the merits.

Petitioners then applied for certiorari.

REASONS FOR DENYING THE PETITION.

1.

The Decision of the Court of Appeals Was Not a Final One, Its Grounds Were Narrow and a Consideration by This Court Would Not Settle Any Broad or Important Question of Federal Law.

The judgment sought to be reviewed is not final and, because of the narrowness of the ground upon which the Court of Appeals for the Third Circuit based its holding, a decision by this court at this time reversing or upholding the Court of Appeals would not resolve a broad or important question.

Despite the assertions of the petitioners, an examination of the original decision of the District Court and its subsequent reversal discloses that only one question has, at the present stage of proceedings, been decided.

This question, an extremely narrow one, is "Did the Court of Appeals err in holding that Section 315 of the Federal Communications Act of 1934 (47 U. S. C. Section 315), which, by its terms applies only to broadcasts by a 'legally qualified candidate for any public office', cannot be stretched by judicial interpretation to apply, as well, to broadcasts by one who is not a candidate for any office?"

The Court of Appeals, relying upon the clear language of the section and equally clear legislative history held that it does not.

Even if the Court of Appeals' decision on this point is believed to be wrong it still leaves open the further questions of whether the broadcasts complained of qualified, even under a broadened interpretation of Section 315, for inclusion under that section, and whether the section freed the broadcasters from liability for defamation.

The judgment of the District Court was based on "the meaning and scope of the word 'use' in Section 315" [R. 28a]. The court decided that "use" included the broad-

casts of persons authorized by a candidate for public office [R. 28a] and then made the further decision that since the broadcasting station could not censor it was without fault and under the law of Pennsylvania [*Summit Hotel v. National Broadcasting Company*, 336 Pa. 182, 8 A. 2d 302 (1939)] could not be held liable.

The Court of Appeals held that the District Court was in error in its interpretation of Section 315 to include persons authorized by candidates as well as candidates themselves, and reversed. It did not go into the further important matters of whether the broadcasts complained of (assuming an authorized speaker to be in the same position as a candidate himself) were *actually* under Section 315 and whether the fact of the radio stations' inability to censor freed them from liability for defamation.

Thus it is clear that neither a reversal nor an affirmance of the Court of Appeals' decision would settle any broad or vital question of national import. It would not even settle this single case. On this record, this court could reach only one of several points at issue and that affecting only these petitioners and not the entire industry or the public as a whole.

2.

The Interpretation of Section 315 by the Court of Appeals Is Conducive to Freedom of Speech and Is in the Public's Interest.

Petitioners argue that the interpretation of the Court of Appeals is opposed to the public interest [Petition, 3].

Actually, the opposite is the truth.

Likewise there is no ground for the fear expressed by the District Court (R. 29a) that, under the Court of Appeals' interpretation, spokesmen for one side would be given unlimited time to the exclusion of the other.

Surely, the answer to this is that a license to broadcast is for three years only (47 U. S. C. A. 307 (d)) and no

license may be renewed unless the Federal Communications Commission finds that the public interest would be served thereby (47 U. S. C. A. 309 (a)).[1] It is not difficult to imagine the public outcry and consequent disaster that would attend any such attempt at favoritism on the part of a broadcasting station.

The reason for confining the exclusion of the station's right of censorship to speeches by the candidates themselves is one that commends itself to common sense and public policy.

Broadcasting stations have the right to refuse any program which they reasonably believe to be unsatisfactory, unsuitable or contrary to the public interest. Indeed, this right is made a condition of licensing in the case of a station affiliated with a network organization (47 C. F. R. 3.105) and is specifically granted in the case of political speeches by Section 315.

This right is accorded them not just to allow them to protect themselves from the consequences of defamatory publications but to defend their financial investment and property right of good will against the unfavorable reaction of their listeners to objectionable programs.

In the case of political broadcasts, when all the terms of the Congressional command have been complied with and the station's facilities are "used" for that purpose it is evidently in the public interest not to allow censorship by the station of a matter of such vital importance as the free discussion, by candidates, of the issues of the campaign.

Consider, however, the abuse that reasonably could be anticipated to arise from an extension of this prohibition to persons other than the candidate.

We may expect that the candidate himself, seeking election, will not indulge in such wild and unfounded

(1) "The Commission may refuse to review the defendant's license if it has failed to act in the public interest." McIntire v. Wm. Penn Broadcasting Co., 1945, C. C. A. 3d, 151 F. 2d 597, 599 (cert. den. 327 U. S. 779, 90 L. Ed. 1007, 66 S. Ct. 530). See also Bay State Beacon, Inc. v. F. C. C., 171 F. 2d 826.

charges and breaches of public morals and decency as would endanger his own candidacy. However, if he does, retribution falls on his own head.

By this very logic the extension of the privilege of freedom from censorship to someone speaking allegedly on the candidate's behalf is excluded.

This representative of the candidate might be utterly indifferent to his principal's chances of success. He might be someone so unheeding of ordinary decency as to revel in defaming and traducing honest citizens without a vestige of reason and embarrassing and harming them in their social and economic lives.

Let it not be said that these are gaudy imaginings—conjectures—fanciful fears of improbable events. One, at least, of them describes with tolerable accuracy the results of Meade's speeches over the radio which furnish the subject matter of this suit.

Consider how remote becomes the control of the candidate over the speechmaker. In the instant case it is claimed that the candidates authorized Wm. F. Meade and the entire Republican Central Campaign Committee "to campaign for their election and, as part of the campaign to contract for the rental of radio facilities and to use defendant's broadcasting station" (R. 17a).

Note that there is no authorization to any particular person to make the radio speeches—presumably the Campaign Committee could have delegated this task to anyone—how far the three Congressional words have been extended. It is no longer necessary for the candidate to speak himself or to designate his spokesman—he has relinquished this privilege to others—what is to prevent them, in turn, passing it on—and on—and on, so long as the chain of authority may eventually be traced back to the candidate.

Considered from another point of view the necessity of confining the words "use" by the "legally qualified candidate" to the candidate alone is equally as apparent and compelling.

In discussions of liability under Section 315 it is often expressly stated [2] and, when not stated, tacitly assumed that the speaker (candidate) is, of course, liable for his utterances so that redress can always be sought from the "real" culprit.

Since the immunity claimed by the broadcasting station arises solely because of the use of its facilities for political purposes and since it is claimed that the immunity covers not only the utterances of the legally qualified candidate himself but the remarks of anyone authorized to speak on his behalf it is apparent that the defendant is claiming an agency relationship between candidate and speaker and it is obvious that the basic axiom of the Law of Agency would apply, "Qui facit per alium, facit per se."

This would create a disastrous situation.

When a candidate's agent speaks, immunity can cloak the station only on the theory that when the candidate speaks through an agent he himself is speaking. On that theory candidates will become vicariously liable for whatever their agents say and consequent reluctance to speak through agents will hamper rather than foster the public interest in having campaign issues freely discussed.

The authorization by A, a candidate, of B to speak for him, constitutes a principal-agent relationship between them. (Restatement of the Law of Agency, Sections 1 & 3.)

The candidate, therefore, who may be campaigning for the Presidency of the United States would become liable for the utterances of hundreds or thousands of persons who were properly authorized to speak over the radio on behalf of his candidacy. Restatement of the Law of Agency, Section 247, *Bruce v. Reed*, 104 Pa. 408, 49 Am. Rep. 586 (1883).

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(2) "The actual speaker, of course, is completely liable for the contents of his remarks. Section 315 of the Act does not affect this liability in any manner nor protect the speaker against civil actions for libel and slander or criminal prosecutions arising out of his violation of any federal or state law." Defamation by Radio by R. C. Donnally, 34 Iowa Law Review 12, 36, note 97 (1948).

The immunity arises only because of the claimed agency relationship of candidate and speaker. It follows that the duties of principal and agent apply equally with the privileges. This, it is submitted, is a necessary and logical consequence of extending the exemption of the broadcasting station from its customary liability as a publisher of defamation from the broadcasts of a candidate himself to those of his agents.

Such a result would soon put an end to all campaigning over the air except by the candidate himself. The consequence of the application of the theory that the defendant advances would be the opposite from what is claimed. Instead of freeing political broadcasts it would, in effect, all but abolish them.

This anomalous situation would surely not be in the public's interest nor in the interest of the candidate or the radio stations.

Once this road is taken, there is no ending. The only distinction between this case, involving a broadcasting station and a street corner speaker campaigning on behalf of a mayor or governor is the immunity claimed by the station.

On the theory of agency, implicit in petitioners' argument, every candidate would be liable for the defamatory utterances of every street corner speaker authorized to campaign for him.

Would such a state of affairs be conducive to freedom of speech? Obviously not.

3.

On the Single Point Decided the Decision of the Court of Appeals Was Correct.

a.

Congress Meant to Confine Section 315 to the Broadcasts of Candidates Themselves.

Petitioners have devoted many pages to attempting to wring an opposite meaning out of a full and clear record of Congressional Intent.

Respondent hastens to state that he will not repeat or add to the quotations, or even citations, from the Congressional Record and Committee Reports. Sufficient is set out in the Record and the Petition and Brief in Support of Petition to gather the clear intent of Congress to confine Section 315 to the utterances of candidates alone.

More may be found by pursuing the cited speeches and reports beyond the confines of the portions already quoted. No matter how thoroughly the debates and reports are canvassed, nothing can be found to support the contention of petitioners that Congress meant to include what it expressly struck out—the speeches of persons other than the candidates themselves.

On the contrary, the further lines and pages of the Congressional Record lend added support to the view set out in the Court of Appeals' decision and no amount of tortured reasoning nor fourth dimensional semantics can overcome the evident intent of plain words and clear thought.

The fact remains, Section 315 (with its identical predecessor) has been the law for twenty-four years;—its language restricts it to "qualified candidates for any public office", although attempts have been made, without avail, to broaden it to include other than the candidates themselves;—accordingly it is entirely reasonable to assume that by these words Congress meant what it said. If it did not, the remedy lies with the Congress and not with this Court.

b.

The Regulations of the Federal Communications Commission Support the Interpretation of the Court of Appeals.

In its Regulations the F. C. C. has shown that it understood Section 315 to apply to the utterances of candidates alone.

It defines "legally qualified candidate", in great detail, as follows:

"A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:

"(1) Has qualified for a place on the ballot or

"(2) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be." [47 C. F. R. 3.190 (a).]

If, as petitioners contend, anyone making a broadcast on a political subject is covered by the Act, this detailed definition is unnecessary and futile.

In other regulations the F. C. C. made a clear distinction between the candidate himself and other persons acting for or on his behalf.

For example:

"If a speech is made by a political candidate, the name and political affiliation of such speaker shall be entered (in the station log)." [47 C. F. R. 3.181 (a) (2).]

"Every licensee shall keep and permit public inspection of a complete record of all requests for broadcast time made by *or on behalf*[3] of candidates for public office." [47 C. F. R. 3.190 (2) (d).]

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(3) Emphasis Supplied.

These excerpts from the Regulations of the F. C. C. show that there is a distinction to be made between "candidates" and others. In accordance with Section 315 the words "political candidate" are used when speaking of a broadcast—but when applying for time is referred to, the words "by or *on behalf of candidates*" are employed.

If it were considered that persons other than candidates might speak under Section 315 the words "on behalf of" would have been used in Section 3.181 (a) (2) as well as in Section 3.190 (2) (d).

Again we have plain words employed in their everyday meaning. No need for textual exegesis or the higher criticism.

c.

The Distinction Between "Candidate" and Speakers on "Behalf of a Candidate" Is Recognized by the Broadcasting Industry and Many State Legislatures.

Perhaps it is only modesty that prevents the petitioners from acknowledging that they are perfectly familiar with the differences between a statute that says "candidate" and one that says "on behalf of any candidate".

Section 2 of a suggested statute on radio defamation, promulgated by the National Association of Broadcasters, provides as follows:

> "In no event, however, shall any . . . station . . . be held liable for any damages for any defamatory statement uttered over the facilities of such station . . . *by or on behalf*[4] of any candidate for public office." [Defamation by Radio, Donald H. Remmers, 64 Harvard Law Review 727, 741.]

Ten states have adopted statutes more or less in accord with the National Association of Broadcasters' suggestion. Those of California, Colorado, Georgia, Louisiana, Maine,

(4) Emphasis Supplied.

Nebraska and Virginia adopt the wording "or on behalf of". The others do not. [Defamation by Radio, Donald H. Remmers, 64 Harvard Law Review 727, 743-744.] There seems to be no confusion in anyone's mind; when it is desired to confine the exemption from liability for defamation to the words of the candidate this is plainly stated, when the exemption is extended to the broadcasts of others this, too, is as plainly stated.

4.

The Court of Appeals Could Have Reached Its Decision on Other Grounds.

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a.

The Broadcasts Were Not Broadcasts Under Section 315.

It must be borne in mind that there are types of political programs other than broadcasts by legally qualified candidates under Section 315.

The line between a political broadcast and one on some controversial social or economic issue is very fine, indeed.

The discussion of whether a municipality should have a new waterworks is political—even when discussed at a time when there are no candidates within the definition of Section 3.190 of the F. C. C. Regulations. *This is not a broadcast under Section 315 of the Act.*

Likewise, during campaigns there often have been hour long entertainment programs, with music, singing and dramatics, *sponsored* by a political committee on *behalf* of its candidate or by the candidate himself. These would not come under Section 315.

They would fall under the section dealing with sponsored programs. Section 3.189 (d) of the F. C. C. Regulations [47 C. F. R. 3.189 (d)] deals with this situation:

> "In the case of any program, other than a program of advertising commercial products or services, which

is sponsored, paid for or furnished, . . . by a corporation, committee, association or other unincorporated group, the announcement required by this section (before and after the program) shall disclose the name of such corporation, committee, association or other unincorporated group."

This, it is submitted, is the classification under which Meade's speeches fell.

Consider the announcement made before and after his speeches:

> "The following (preceding) time was contracted for by the Republican Central Campaign Committee. Our speaker tonight is (was) William F. Mead, Chairman of the Committee. . . ." [R. 17a, 18a.]

Consider also the fact that the defendant's dealings were entirely with the Republican Committee and that *not a single Republican Candidate's name was mentioned—nor the offices for which any one of them was running—in the entire course of the two speeches.* [Record 3a-13a.]

These speeches were clearly not the use of a broadcasting station by legally qualified candidates for public office! They were simply politically sponsored speeches and differed in no wise from other programs on what are familiarly referred to as "controversial subjects".

b.

Section 315 Does Not Relieve a Broadcasting Station From Liability for Defamation.

Again assuming that Section 315 includes what it implicitly excludes—supporters as well as candidates—it is submitted that a broadcasting station is not relieved of liability for defamation because of its supposed inability to censor.

Respondent has treated this point at length in his Brief for Appellant [R. 18-23] and the Court is respectfully referred to those pages for a consideration of the matter.

5.
There Is No Conflict of Decision.

There has been no conflict among the Courts of Appeals on this question—indeed, this is the first time such a question has reached them. Considering the length of time this statute has been in force and the number and intensity of bitterness of political campaigns all over the United States during that period—*and* the millions upon millions of words broadcast in those campaigns—can it fairly be stated that this is an important issue?

The answer would appear to be that this question has certainly not bothered the broadcasting industry, its clients or the courts, and that what we have here is the interest of the petitioners in avoiding liability for what were clearly libelous utterances. The importance of the question is confined to the interests of the petitioners alone.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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